INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute and Executive Order involved	2
Statement:	
The indictment	4
The defendants	5
The fraud	5
The currency deposits in 1945	11
The genesis of the prosecution	13
Petitioners' version of their "disclosure" activities	16
The credibility of E. Allan Lustig	19
The contradiction of E. Allan Lustig's testimony	20
Petitioners' motion to suppress	23
Trial, verdict, and appellate proceedings	24
Argument	25
Conclusion	32

CITATIONS

Cases:	
Botany Mills v. *United States*, 278 U. S. 282	29
Cohen v. *United States*, 291 Fed. 368	31
Cooper v. *United States*, 9 F. 2d 216	30
Delaney v. *United States*, 263 U. S. 586	29
Denny v. *United States*, 151 F. 2d 828	31
Ford v. *United States*, 273 U. S. 593	30
Gila Valley Ry. Co. v. *Hall*, 232 U. S. 94	30
Gladstone v. *United States*, 248 Fed. 117, certiorari denied, 247 U. S. 521	29
Goldman v. *United States*, 316 U. S. 129	28, 30
Lisenba v. *California*, 314 U. S. 219	31
Lyons v. *Oklahoma*, 322 U. S. 596	31
McAffee v. *United States*, 105 F. 2d 21	31
Nardone v. *United States*, 308 U. S. 338	30
Steele v. *United States*, 267 U. S. 505	30
United States v. *Blaisdell*, 3 Ben. 132, Fed. Case No. 14,608	29
United States v. *Johnson*, 319 U. S. 503	29
United States v. *McCormick*, 67 F. 2d 867, certiorari denied, 291 U. S. 662	29
United States v. *Morgan*, 222 U. S. 274	29
Whiskey Cases, 99 U. S. 594	29
Wilson v. *United States*, 162 U. S. 613	31

760560—47——1

Statute: Page
Internal Revenue Code:
Sec. 3614 (26 U. S. C. 3614) 30
Sec. 3761 (26 U. S. C. 3761)) 2, 29
Miscellaneous:
Executive Order No. 6166, June 10, 1933 (5 U. S. C. 1940 ed., Sec. 124 *et seq.*):
Sec. 5 ..... 3, 29

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 279

HENRY LUSTIG, E. ALLAN LUSTIG AND JOSEPH SOBEL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 2193–2201) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 21, 1947 (R. 2201). The petition for a writ of certiorari was filed on August 19, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13,

1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the petitioners were denied their constitutional rights by withdrawal of the alleged voluntary disclosure from the jury's consideration except insofar as it might be relevant to the element of wilfulness in connection with the filing of admittedly false returns.

2. Whether the petitioners were denied their constitutional rights by the trial court's admission of certain corporate records allegedly obtained by the Government as the result of a promise of immunity.

3. Whether the alleged disclosure effected a compromise within the meaning of Section 3761 of the Internal Revenue Code.

STATUTE AND EXECUTIVE ORDER INVOLVED

Internal Revenue Code:

> SEC. 3761. COMPROMISES.
>
> (a) *Authorization.*—The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense.

(b) *Record.*—Whenever a compromise is made by the Commissioner in any case there shall be placed on file in the office of the Commissioner the opinion of the General Counsel for the Department of the Treasury, or of the officer acting as such, with his reasons therefor, with a statement of—

(1) The amount of tax assessed,

(2) The amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and

(3) The amount actually paid in accordance with the terms of the compromise.

(26 U. S. C. 3761.)

Executive Order No. 6166, June 10, 1933 (5 U. S. C., Sec. 124 *et seq.*):

SEC. 5. *Claims by or against the United States*

The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States and of defending claims and demands against the Government, and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.

As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to ap-

peal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

For the exercise of such of his functions as are not transferred to the Department of Justice by the foregoing two paragraphs, the Solicitor of the Treasury is transferred from the Department of Justice to the Treasury Department.

Nothing in this section shall be construed to affect the function of any agency or officer with respect to cases at any stage prior to reference to the Department of Justice for prosecution or defense.

STATEMENT

The indictment.—The petitioners were indicted on December 6, 1945 in the Southern District of New York on twenty-three separate counts (R. 1). The first twenty-two counts charged them with wilfully attempting to defeat and evade, by the filing of false and fraudulent returns, for fiscal and calendar years ending during the years 1940 to 1944, inclusive, substantial amounts of taxes owing by seven corporations owned by Henry Lustig (R. 11–57). The indictment charged that these returns understated net income by a total of $3,455,755.41 and the resultant tax liability by a total of $2,872,766.62 (R. 723, 2172; Ex. 306, R. 2026). The twenty-third count charged that the petitioners conspired to commit all of the substantive offenses, in pursuance of which the following overt acts, *inter alia,* were committed: the over-

statement of purchases by $2,000,000; the understatement of sales by $1,800,000; the receipt by Henry Lustig of a substantial part of coat and hat check gratuities; the maintenance by Henry Lustig of a safe deposit box to hide currency (R. 53–57).

The defendants.—Henry Lustig was the owner of all of the stock of Henry Lustig Co., Inc. (Ex. 114, R. 1962), which in turn owned all of the stock of Restaurants & Patisseries Longchamps, Inc. (Ex. 98, R. 1958). The latter corporation in turn owned all of the stock of 253 Broadway Corporation, 624 Madison Avenue Corporation, Broadway and 41st Street Corporation, Lexington Longchamps, Inc., and Fifth Empire, Inc. (Exs. 251, 232, 184, 159, 207, R. 1999, 1994, 1981, 1974, 1987). Henry Lustig was the president and treasurer of all these corporations. E. Allan Lustig, Henry Lustig's nephew, was secretary and general manager of all the corporations. (R. 394.) Joseph Sobel, a certified public accountant, acted as chief accountant for the corporations (R. 395).

Martin Platt, office manager and cashier at the main office of all the corporations, and Wallace Platt, his brother, acted as bookkeepers for the Lustig corporations (R. 291, 393–394). The Platts entered pleas of guilty (R. 235–237) and testified for the Government (R. 290–392, 392–429, 492–656).

The fraud.—In the early part of 1941, Wallace Platt prepared a trial balance for Restaurants &

Patisseries Longchamps, Inc., for the year 1940 and submitted it to Joseph Sobel for final approval (R. 294). Sobel instructed him to overstate purchases (R. 295). Platt informed Sobel that it was "the wrong thing to do", to which Sobel replied (R. 296):

> I got a lot more to worry about than you. I am a CPA. I am telling you what to do. If you don't feel like doing it there is somebody else who will.

Wallace Platt was given a period of grace to make a decision; he complied with Sobel's instructions (R. 296). Sobel furnished him with a memorandum itemizing the amounts by which purchases were to be increased (R. 295), instructed him to erase correct monthly totals on the ledger sheets and to substitute new and higher figures (R. 298, 304). Platt was instructed to use a pen knife rather than an eraser because figures erased with a pen knife would be less conspicuous and because with a pen knife it would be possible to make erasures without crossing the accounting lines (R. 313). Eventually, however, Sobel permitted Wallace Platt to use an eraser in order to save time (R. 314). The same system was used to falsify the records of earnings of Restaurants & Patisseries Longchamps, Inc., for subsequent years, as well as the records for the other corporations (R. 305).

In 1943, Sobel informed Wallace Platt that the profits of the corporations were enormous and

that the excess profits tax would "take away most of the profits" (R. 331, 333). He instructed Platt to falsify sales as well as purchase figures, the former by a pre-determined amount daily (R. 331, 339). Wallace Platt protested that "suckers" like himself have to pay taxes and that Henry Lustig decided "for himself how much he wants to pay" (R. 331–332).

Henry Lustig Co., Inc., the top holding company, was engaged in the wholesale produce business (R. 435), catering both to independent customers and to its subsidiaries. Restaurants & Patisseries Longchamps, Inc., the intermediate holding company, owned and operated a number of restaurants in the City of New York and each of its subsidiaries owned and operated a restaurant in the City of New York. Several of these restaurants paid as rent a percentage of their receipts (R. 330–331). In order to allay the suspicions of the lessors, true statements of the sales were furnished to them and the proper percentage paid (R. 333), while special books were kept for income tax purposes (R. 334). Complicated adjustments were necessary to reconcile the true and the fraudulent set of books; for income tax purposes the true rent paid could not be revealed, lest it furnish a clue to the actual income from sales (R. 334).

The bookkeeping phase of the scheme had become so complicated that a special office was built in which Wallace Platt could attend to his manip-

760560—47——2

ulations without being observed by the rest of the office staff (R. 343–344). The manipulation of the books of Henry Lustig Co., Inc., was performed by one Morris Brown until 1943; illness forced him to retire (R. 434, 436–445). Thereafter, Martin Platt took charge of making false entries (R. 505, 507).

The daily receipts of the restaurants were regularly deposited in various corporate bank accounts (R. 398). To obviate the disparity between the bank accounts and the manipulated books, the excess funds on deposit were withdrawn. Checks were drawn on check blanks extracted from the back of corporate check books, made payable either to the order of Henry Lustig, personally, or to cash. (R. 405–406, 413.) Some of these checks were deposited in Henry Lustig's personal bank accounts in New York City, Miami, Florida, and Lexington, Kentucky (R. 413, 414, 418). Most of the checks were simply cashed and the money was delivered to Henry Lustig (R. 405–407, 416), who secreted a large part of it in the vault at the County Safe Deposit Company in the City of New York (R. 548–549). The checks were drawn pursuant to general instructions given by Joseph Sobel to Martin Platt (R. 405–406). Martin Platt received the schedule of the amounts to be withdrawn weekly from every corporation (R. 406), which amounts were not to be recorded on the check stubs (R. 405). Ini-

tially, these checks, together with slips of paper giving essential data about each (R. 405–406), were presented to Henry Lustig for signature (R. 406). After signing each check, Henry Lustig retained the paper slip pertaining to it (R. 406). The check was given to Martin Platt to be cashed at the bank on which it was drawn (R. 406). The first time Martin Platt cashed one of these checks he received $100 bills from the bank and gave them to Henry Lustig (R. 406). Lustig instructed him to get at least $500 or $1,000 bills the next time (R. 406).

After a few such transactions, Henry Lustig instructed Martin Platt to have the checks signed by E. Allan Lustig (R. 406–407). Martin Platt conveyed these instructions to Allan and from then on the latter signed the checks and kept the accompanying slips of paper (R. 407). The cash in every instance was given to Henry Lustig (R. 407, 416). This withdrawal of cash began in February, 1943, and continued until the middle of December, 1944 (R. 405, 416). The amounts withdrawn weekly gradually increased from about $8,000 to about $40,000 (R. 423). Approximately $2,200,000 was withdrawn by checks made payable to cash and about $600,000 more was withdrawn by checks made payable to Henry Lustig (R. 423–424).

Fictitious banks loans were entered on the corporate books and fictitious interest was withdrawn

(R. 313, 441). Substantial payments for Henry Lustig's personal expenses were made from corporate funds (R. 660–690).

The books of the corporations contained no trace of any part of the proceeds from hat check stands in the various restaurants. These proceeds were delivered once a month in cash to Henry Lustig personally; he directed that only a small part be deposited to the various corporate accounts and he retained the major portion (R. 398.) Martin Platt estimated that the hat check tip money averaged approximately $7,000 to $8,000 per month (R. 399) and that approximately 15% to 20% of it was deposited (R. 400).

False corporate returns were prepared by Wallace Platt under the direction of Joseph Sobel (R. 294–305). They were signed by Henry or E. Allan Lustig and in a few instances by one Kal C. Lustig. All of the returns also carried the signatures of Joseph Sobel and Wallace Platt. (Exs. 1–45, R. 1925–1939.) The total net income understated by the seven corporations in the tax returns covered by the first twenty-two counts of the indictment was proved to be the amount charged in the indictment, namely, the total sum of $3,455,755.41, and the resultant understatement of tax liability was established as the total sum of $2,872,766.62 (R. 723, 2172; Ex. 306, R. 2026). This calculation does not include the hat check money for which no precise figures are available.

The currency deposits in 1945.—Early in 1945 there were widely current and published rumors that bills in large denominations might be recalled, their owners made to account for them (R. 1275, 1318, 2172), and that safe deposit boxes might be "frozen" (R. 1281).

Beginning on February 28, 1945, and continuing until March 28, 1945, the petitioners removed, at various times, $1,815,000 in bills of large denominations ($500 and $1,000) from the vault in which they had been hidden and deposited that money in eight banks, to more than twenty-five bank accounts, some of them corporate, some of them personal and belonging to Henry Lustig (R. 554–564, 2102–2108). Fifty-seven deposits were made (R. 1191), only a few of them at the Lawyers Trust Company, which was the bank located directly above the safe deposit company in which the currency had been secreted (R. 1198). Many new accounts were opened during this period to receive some of the deposits (R. 645). The amounts deposited bore no relationship to the corporate funds diverted; two corporations received no deposits (R. 1198) and Henry Lustig's personal accounts received $808,000 (R. 1199). No entry on the corporate books was made relating to any of these deposits until the end of April (R. 654–655).

During that period in which the money was being deposited, the hat check receipts continued to be handled in the usual way. Approximately

20% was deposited on March 27, 1945, and reported on the books, and the balance of approximately $5,000 was given to Henry Lustig in cash. (R. 401–402.) [1]

The last returns which are the subject matter of the indictment were not filed until March 15, 1945 (Exs. 10, 11, 44, 45, R. 1928, 1939). One understated the tax due by $687,866.95 and the other by $19,026.81 (R. 2178; Ex. 306, R. 2026). Both were signed by Henry Lustig and Joseph Sobel (Exs. 10, 11, 44, 45, R. 1928, 1939). The instructions to falsify the books of the two corporations for which these returns were filed were given during the two-week period preceding the filing of the returns on March 15, 1945, when, after receiving financial statements of the amounts of profit of Restaurants & Patisseries Longchamps, Inc., and of Henry Lustig Co., Inc., as shown by the books, which had already been subjected to false daily entries, Sobel directed further overstatement of purchases in the amount of $475,000 for one corporation and $36,000 for the other (R. 354–355, 508). He ordered that this should be done by making new ledger sheets rather than by erasures "because it would

[1] The April and May hat check collections were likewise not deposited in full. When Martin Platt delivered the balance to Henry Lustig at the end of April he was told to see Sobel, who advised him that he would show him how to treat it (R. 402–403). Meanwhile, the April and May hat check collections were kept in the office safe (R. 403). The April, May and June collections were finally deposited in the corporate accounts on July 14, 1945 (R. 403, 404).

show" (R. 508–509). The original sheets were to be destroyed (R. 509).

On February 19, 1945, E. Allen Lustig, on behalf of Broadway and Forty-first Street Corporation, signed and filed with the revenue agent's office a Form 874 consenting to an additional assessment of $604.28 for the fiscal year ending March 31, 1944, the true deficiency for that year being $206,461.92 (R. 1189; Ex. 319, R. 2028). On April 6, 1945, a similar form was filed concerning the tax liability of 253 Broadway Corporation, providing for an additional assessment of $59.02 for the fiscal year ending June 30, 1944, the true deficiency for that year being $44,774.67 (R. 1207–1207; Ex. 323, R. 2036).

The genesis of the prosecution.—Between March 3 and 13, 1945, the Foreign Funds Control Department of the Federal Reserve Bank in the City of New York received reports (R. 1332, 2056) from various member banks that large sums of money were being deposited to the accounts of Henry Lustig and those of his corporations. These reports, which contained the numbers of the bills deposited, were referred for investigation to Joseph A. Sarno, a Federal Reserve Bank employee. Both Henry Lustig and the various named corporations were checked for possible Axis involvements, but no connection with any foreign country was found. (R. 1332.)

On March 15, 1945, Sarno wrote a memorandum addressed to Norman P. Davis, in charge of the

Foreign Funds Control Department, setting forth a list of the currency involved (R. 2054, 1332). The memorandum was handed to Davis on the afternoon of March 15, 1945. On the morning of March 16, 1945, Davis went to Washington and transmitted the memorandum to L. C. Ahrens, Assistant General Counsel of the Treasury Department (R. 1336).

On March 24, 1945, Joseph J. O'Connell, General Counsel of the Treasury Department, gave the memorandum to W. H. Woolf, Chief of the Intelligence Unit of the Bureau of Internal Revenue (R. 2076). On March 24, 1945, Commissioner of Internal Revenue Joseph D. Nunan, Jr., conferred in New York City with Hugh McQuillan, Special Agent in Charge of the New York office of the Intelligence Unit, and gave the latter directions concerning Lustig and his enterprises (R. 1343). On the same day, March 24, 1945, Woolf also spoke on the telephone with McQuillan (R. 1343–1344) and thereupon forwarded a letter to McQuillan, dated March 24, 1945, referring to the "telephone conversation of even date" and enclosing the memorandum of Davis concerning the cash deposits made by Lustig and his corporation (R. 2076). This letter was received by McQuillan on March 26, 1945 (R. 1344).

On March 26, 1945, McQuillan and Nunan visited the Federal Reserve Bank in New York City and conferred with its president, Mr. Sproull, and

its vice-president, Mr. Rounds (R. 1347). On the same day, McQuillan called Revenue Agent in Charge Krigbaum "into the investigation" (R. 1353). He arranged with Krigbaum to select one of his best agents (R. 1354). On March 26 or 27, 1945, McQuillan assigned special agents to the investigation of Lustig and his companies (R. 1348). On March 27, as a result of Woolf's letter and his conversations, McQuillan requested various tax returns pertaining to the case (R. 1347, 2080).

McQuillan was in daily contact with Krigbaum (R. 1353, 1376), with the special agents (R. 1348) and with his superiors in Washington (R. 1378, 1382). Periodic reports of the progress of the case were sent to Woolf in Washington (E. g., R. 2082, 2087).

On April 18, 1945, one Donald C. Diehl, an internal revenue agent, was assigned to the Lustig matter. On April 19, 1945, he telephoned Sobel for an appointment to examine the records pertaining to the income tax returns of Henry Lustig for the year 1944. Sobel declined to make an appointment immediately, promised to call Diehl back, but failed to do so (R. 701). When Diehl called him again on April 23, 1945, an appointment was made for April 30. Counsel for Henry Lustig requested a further postponement until May 2, and because Diehl was then taken ill, it was not until May 14, 1945, that he appeared at

760560—47——3

the offices of the Lustig companies and started an examination of their books. (R. 702.)

Meanwhile, on April 25, 1945, the petitioners filed letters (Ex. BB, R. 2123–2125) with the Collector of Internal Revenue William J. Pedrick indicating that the tax returns of the corporations "understated" the tax liability, without disclosing the amounts or the years (R. 1427).

Counsel for the petitioners were at once referred to McQuillan (R. 1429), who informed them on April 26, 1945, that they were too late because the investigation had been under way "for some weeks" (R. 1357–1358).

Petitioners' version of their "disclosure" activities.—The petitioners' version of the events preceding the filing of the letters is contained largely in the testimony of E. Allan Lustig, the only one of the petitioners who gave evidence. Allan testified that Henry Lustig told him sometime in January, 1945, that Sobel, in December, 1944, had said that the income tax returns of the various companies were "wrong." Henry Lustig allegedly stated that as soon as he returned from a trip to Florida he would "redeposit" the money that had been accumulated in the company vault and that he would "make a disclosure" of the fact that incorrect returns had been filed (R. 1084).

On February 27, Henry Lustig returned from Florida (R. 1089). Beginning February 28, cash deposits were made in various accounts by the

Lustigs (R. 1089, 2102–2108). E. Allan Lustig denied that these deposits were in any way connected with the reports then widely current that the Treasury was about to call in bills of large denominations and would make their possessors account for them (R. 1182–1183, 1184).

Between March 3 and 9, 1945, E. Allan Lustig observed bank tellers making notations "of the bills." He asked why that was being done (R. 1090) and was told that it was for "the record" (R. 1091). This was news to him (R. 1089–1094) and he allegedly reported his observation to Henry Lustig (R. 1091).

After some deposits had been made, E. Allan Lustig was informed by two bank officers that the currency deposits might have to be reported to the Government sometime in the future (R. 1095, 1098). He then had a conversation with Henry Lustig and Joseph Sobel (R. 1099) and he then allegedly endeavored to get in touch with William J. Pedrick, the Collector of Internal Revenue. He testified that he tried to reach Pedrick by telephone, that he tried to visit him, and that when he was unsuccessful, he requested an appointment by letter (R. 1100), of which Exhibit SS (R. 2140) was an alleged carbon copy retained in the Lustig files. The carbon copy was dated March 24, 1945, and allegedly Pedrick called E. Allan Lustig on March 26, 1945, and made an appointment to see him at the 59th Street Longchamps

Restaurant at twelve o'clock of the same day (R. 1106–1107). Allan informed him at the luncheon that he wanted to discuss tax returns with him and suggested a later meeting at the Custom House. There followed a second telephone call and a later meeting was allegedly arranged for four o'clock of the same day at the Custom House. (R. 1108.) Allan fixed the hour of this alleged meeting definitely "around four o'clock" and testified that he had a "long and cordial conversation" with Pedrick (R. 1203) whom he left at about five o'clock (R. 1206).

E. Allan Lustig further testified that he told Pedrick at that time that wrong returns had been filed, that large amounts of money had been accumulated in a bank vault, and that this money was then being redeposited. Pedrick allegedly stated that he would look into this and check with Krigbaum's office. (R. 1109.)

On April 10, E. Allen Lustig allegedly saw Pedrick and at that time Pedrick allegedly told him that he had checked both Krigbaum and McQuillan and could "find nothing there against us" (R. 1115).

On April 19 and 20, 1945, E. Allan Lustig allegedly attempted to reach Pedrick and finally managed to see him on April 20 (R. 1116, 1134). He denied that his activity in trying to locate Pedrick had anything to do with the fact that Agent Diehl had called Sobel on April 19 (R.

1135). He stated that when he did see Pedrick he mentioned that Diehl had called and that in reply Pedrick told him that there was nothing to worry about (R. 1117).

In the afternoon of April 20, the Lustigs and Sobel saw one Oestreicher, a tax consultant. (R. 1117.)

Allegedly, another meeting between E. Allan Lustig and Pedrick took place on April 24, at which Pedrick requested E. Allan Lustig not to mention in the letters then being prepared that the Lustigs had made a disclosure to him for the reason that his failure to notify others at once about the disclosure might cost him his job (R. 1118–1120).

On April 24, Oestreicher called Commissioner Nunan and stated, without disclosing the name of his client, that he wanted to make a voluntary disclosure. Commissioner Nunan referred him to Pedrick. (R. 926.) A meeting took place in Pedrick's office on April 25, 1945, at which letters stating that taxes of the Lustig companies had been understated were turned over to Pedrick (R. 928–930). Both Oestreicher and E. Allan Lustig testified that Pedrick on that occasion stated that E. Allan Lustig had been to see Pedrick before about the matter (R. 930, 1123).

The credibility of E. Allan Lustig.—E. Allan Lustig testified at the trial that he had signed checks to the order of cash, totalling about

$40,000 weekly, without having any idea about what the cash was to be used for (R. 1175); that although he determined what prices were to be charged in the restaurants (R. 1163–1164), he did not know whether his price policy caused profits or losses (R. 1165–1168); that he had signed several of the false corporate returns (Exs. 16, 17, 20, 21, 28, 29, 36, 37, R. 1930–1931, 1934, 1936–1937); and that during four years, on his own income tax returns, he claimed his mother-in-law as a dependent although she had been dead for some time (R. 1147–1149).

The contradiction of E. Allan Lustig's testimony.—Collector Pedrick testified that he had two meetings with E. Allan Lustig on April 10, 1945, and that he had not seen him for more than a year prior to that date (R. 1417). At the first meeting they discussed matters other than tax matters (R. 1418–1419). Later in the day E. Allan Lustig asked him whether he knew who the person was who had been referred to in a newspaper column as being a restaurateur under investigation for income tax evasion (R. 1419). Collector Pedrick informed E. Allan Lustig that he did not know (R. 1419, 2173–2174).

Pedrick, corroborated by his diary, denied that he had met E. Allan Lustig at all on March 26 (R. 1432). One Glick, then an O. P. A. official, on the basis of his diary, testified that he and not E. Allan Lustig lunched with Pedrick that day (R. 1487–1488). Concerning the later meet-

ing on the same day, which allegedly took place at four o'clock and lasted for about an hour, the following citizens of New York testified that Pedrick, as a matter of fact, had been with them between four and five-thirty of that day and consequently could not have been at the Custom House with E. Allan Lustig: Charles C. Lockwood, Justice of the Supreme Court of the State of New York (R. 1485–1486); Jonah J. Goldstein, Judge of General Sessions of the City of New York (R. 1486–1487); Robert Moses, head of the New York City and New York State Park Systems, head of the Triboro and Tunnel Authority, Member of the New York City Planning Commission and coordinator of construction in New York City (R. 1515–1517); John A. Coleman, Chairman of the Board of the New York Stock Exchange (R. 1544–1546); Howard Cullman, Chairman of the Port Authority (R. 1546–1547); George R. VanNamee, former Public Service Commissioner and Secretary to former Governor Alfred E. Smith (R. 1547–1548); Herbert Bayard Swope, associate member of the United States Atomic Bomb Commission (R. 1548–1549); Eugene F. Moran, vice-chairman of the Governor Smith Memorial Fund (R. 1550).

Concerning Exhibit SS, an alleged carbon copy of a letter with which the crucial appointment for March 26 was made, a handwriting expert testified that stenographic notes from which

Exhibit 83 was supposed to have been copied, could not have been written on March 24, as they purported to be, but were added to the note book at some date after April 3, 1945 (R. 1537).

Moreover, neither the appellants nor their attorneys referred to any purported disclosure prior to that of April 25, 1945, until the afternoon of August 17, 1945 (R. 1551–1552; R. 1476–1478), although numerous occasions called for it. For instance, no reference to such disclosures was made to Agent Diehl when he telephoned Sobel on April 19 and April 23, 1945 (R. 701–702), or in Oestreicher's telephone conversation with Commissioner Nunan on April 24 (R. 926), or in the letters of April 25 (Ex. BB, R. 2123–2125, see R. 134); nor did Oestreicher refer to the earlier date when McQuillan on April 26, and Scanlon on May 15, pointed out to him that his disclosure was too late (R. 1357–1358; Ex. 338, R. 2090).

On May 25, Oestreicher admittedly learned that the Treasury Department did not consider the disclosure as having been timely made (R. 1232), and appreciated that the date became important (R. 1232). Nevertheless in Oestreicher's letter of June 1, to the Commissioner (Ex. 326, R. 2038–2041), in which he stated that he was setting forth a "chronological outline of the steps taken by the taxpayer in order to effect such disclosure", no reference is made to March 26, other than to point

out that it was on this date that Mr. Lustig called at Oestreicher's office for an appointment; the only claim of an earlier disclosure is the contention that the large bank deposits were the first affirmative step in making a voluntary disclosure.

Nor did any of the following events elicit from Oestreicher any reference to the alleged disclosure on March 26, 1945: the Commissioner's letter of June 7, 1945 (Ex. 327, R. 2046) pointing out that there was no voluntary disclosure; the knowledge that on June 5 the Department of Justice was interested in the case by reason of the service of a subpoena (R. 1022); or conferences with Commissioner Nunan, Mr. Wenchel, Chief Counsel of the Bureau of Internal Revenue and others on August 15, 1945, and again on the morning of August 17, 1945 (R. 1551–1552).

Appellants' answer to the charge of recent contrivance is that Pedrick had pledged Allan to secrecy on the ground that his failure to notify others at once about the disclosure might cost him the collectorship (R. 1120), and that secrecy about this matter was first abandoned on August 17, 1945.

Petitioners' motion to suppress.—Prior to trial the petitioners, together with Henry Lustig Co., Inc., Restaurants & Patisseries Longchamps, Inc., Fifth Empire, Inc., Lexington Longchamps, Inc., 624 Madison Avenue Corporation, Broadway and Forty-first Street Corporation and 253 Broadway

Corporation, moved for an order suppressing the use of certain corporate books and records allegedly illegally obtained by the Government through promise of immunity contingent upon a voluntary disclosure (R. 94–140).[2] The motion was denied with leave to renew at trial (R. 158). The motion was renewed at trial and was disposed of at the conclusion of the trial, the court denying the motion to suppress in its entirety (R. 2180–2181). In connection with its disposition of the motion to suppress, the District Court made detailed and specific findings of fact (R. 2171–2178), which are more fully discussed in the Argument, *infra*, pp. 26–28.

Trial, verdict, and appellate proceedings.—At trial, the court charged that as a matter of law prosecution was not barred by the petitioners' alleged compliance with the Treasury Department's voluntary disclosure policy (R. 1861–1862). Nevertheless, the court specifically reserved for the jury's consideration, on the question of the existence of intent to commit the crimes charged, all of the evidence pertaining to the alleged disclosure (R. 1872–1879).

The petitioners were convicted by a jury on all counts (R. 1897) and were thereafter sentenced

[2] The so-called voluntary disclosure policy of the Treasury Department provides generally that in cases in which taxpayers make voluntary disclosures of intentional evasions before investigation, no criminal prosecution will be recommended by the Treasury Department to the Department of Justice.

substantially as follows: Henry Lustig, four years' imprisonment and a $115,000 fine; E. Allan Lustig, three years' imprisonment; Joseph Sobel, two years' imprisonment (R. 1915–1916).

By stipulation the Circuit Court of Appeals approved the consolidation, *inter alia,* of appeals (1) by the petitioners from the judgment of conviction (R. 2184–2185) and (2) by the petitioners and the aforementioned corporations from the order (R. 2180–2181) denying the application for the suppression and return of evidence (R. 2186–2187). Upon appeal, the Circuit Court of Appeals for the Second Circuit found, *inter alia,* that the investigation began at the latest on March 24, 1945 (R. 2197–2198); that it was "fantastic" to suppose that the making of deposits with the funds withdrawn from the safe deposit box amounted to a voluntary disclosure (R. 2196); that there was no disclosure of tax deficiencies until April 25, 1945 (R. 2197); that the proffer of corporate records was in no sense the result of any promise of immunity (R. 2198); that the petitioners' constitutional privileges were not invaded (R. 2199); that the petitioners received no immunity under the compromise statute (R. 2199). Accordingly it affirmed the judgment of conviction (R. 2201).

ARGUMENT

The petition in this case presents arguments resting and depending on an assumption which is entirely hypothetical, viz. that petitioners made a

voluntary disclosure amounting to a confession which was induced by a promise of immunity. That assumption is quite without support on the present record, in consequence of which the questions sought to be presented are never reached.

1. The District Court found as a fact that "At no time between February 28, 1945 and April 25, 1945 was any act of the defendants or of the corporate taxpayers prompted or brought about by any inducement held out to them by any person in authority or any person connected with the government" (Fdg. 19, R. 2176), and that "at no time" during those dates "were the defendants or the corporate taxpayers coerced or compelled or induced, either with or without process, to make incriminatory disclosures" (Fdg. 20, R. 2177).

The District Court likewise found as a fact that the March currency redeposits "were prompted by the belief that currency in bills of large denominations might in effect become contraband and not by any desire or intention voluntarily to disclose frauds on the revenue" (Fdg. 19, R. 2176), and that the filing of two additional fraudulent tax returns after substantial redeposits of currency had been made "conclusively establish[es] that the redeposit of currency was no evidence of any intention on the part of the defendants or the corporate taxpayers to make voluntary disclosure of the frauds theretofore practiced," and "that said redeposits had no connection with or

bearing upon crimes against the revenue" (Fdg. 24, R. 2178). The Circuit Court of Appeals characterized the contention that the making of these deposits amounted to a voluntary disclosure in response to a promise of immunity as "fantastic" (R. 2196).

The District Court further found that "Neither the defendants nor the corporate taxpayers at any time prior to April 25, 1945 disclosed the fraudulent practices of the corporate taxpayers to any government official" (Fdg. 18, R. 2176), and also specifically found that statements submitted in affidavits to the effect that "voluntary disclosure" was discussed between E. Allan Lustig and Collector Pedrick on March 26, April 10, 20, and 24, were false. (*Ibid.*). The Circuit Court of Appeals thought it "clear" that "the investigation began at the latest on March 24, 1945" (R. 2197–2198).

The first disclosure was that contained in the letters of April 25, 1945 (R. 2123–2124; see also R. 134), which contained an invitation to examine the corporate taxpayers' books. Those letters, the District Court found, "were not frank and full disclosures, were not voluntarily made, and were delivered at a time when the defendants well knew that an investigation of their affairs and those of the corporate taxpayers had actually been initiated" (Fdg. 22, R. 2177–2178). "On April 25, 1945, the extent of the frauds practiced by the

corporate taxpayers was not disclosed" (Fdg. 14, R. 2175). These "belated and partial revelations" (Fdg. 23, R. 2178) were "prompted solely by the fact that the defendants and the corporate taxpayers knew that an investigation of their affairs had begun and that an Internal Revenue Agent had made an appointment, deferred at the request of the defendants and of the corporate taxpayers, to commence an examination of the books of the defendant Henry Lustig on April 23, 1945" (Fdg. 19, R. 2176–2177). The subsequent investigation of the books of the corporate taxpayers, between May and August 1945, "was invited by the defendants and by the corporate taxpayers with full knowledge that an investigation had been commenced which would lead to the discovery of fraudulent entries in the books of the corporate taxpayers, and with full knowledge of the fact that said investigation could be commenced and continued with or without the consent of the defendants or the corporate taxpayers" (Fdg. 21, R. 2177).

The Circuit Court of Appeals likewise noted "that the corporate records were in no sense the result of any promise of immunity. They were furnished long after the government investigation had begun" (R. 2198).

These concurrent findings, accurately reflecting the record (see Statement, *supra,* pp. 13–23), need not be independently reviewed here. *Goldman* v.

United States, 316 U. S. 129, 135; cf. *United States* v. *Johnson,* 319 U. S. 503, 518; *Delaney* v. *United States,* 263 U. S. 586, 589–590. They make it abundantly clear that the questions suggested by the petition are academic, without actual relationship to the present record. Those questions happen to be without any substantive merit,[8] though that is now beside the point. But it may be noted in leaving this aspect of the case that, considering all the circumstances, petitioners' reference to their April 25 letters as "confessions, unique for frankness and completeness" (Pet. 27), involves not so much hyperbole as irony.

[8] Even if petitioners had made full disclosure, it is clear, as charged by the trial court, that prosecution would not be foreclosed. *Whiskey Cases,* 99 U. S. 594; *United States* v. *Blaisdell,* 3 Ben. 132, Fed. Case No. 14,608 (S. D. N. Y.); cf. *Gladstone* v. *United States,* 248 Fed. 117 (C. C. A. 9), certiorari denied, 247 U. S. 521; *United States* v. *McCormick,* 67 F. 2d 867 (C. C. A. 2), certiorari denied, 291 U. S. 662. The most authoritative formulation of the voluntary disclosure policy merely implies a self-imposed administrative limitation by the Treasury Department not to refer cases to the Department of Justice for prosecution. Actually, it would seem that there would be nothing to prevent an indictment without referral. Cf. *United States* v. *Morgan,* 222 U. S. 274. Here there is no suggestion that the Department of Justice effected a compromise after indictment, see Executive Order No. 6166 (*supra,* pp. 3–4), and the suggestion that there was any earlier compromise by the Treasury Department under Section 3761 of the Internal Revenue Code (*supra,* pp. 2–3), was correctly characterized by the court below as "illusory" (R. 2199), on the authority of *Botany Mills* v. *United States,* 278 U. S. 282.

2. Petitioners insist (Pet. 17, 23–29) that their constitutional rights were violated because the district court itself determined as a fact whether the disclosure preceded the investigation and was made under a promise of immunity, and did not submit that question to the jury. The contention is untenable, for a number of reasons.

(a) It is firmly settled that the determination of preliminary questions of fact in connection with the admissibility of evidence is within the exclusive province of the trial judge. *Ford* v. *United States,* 273 U. S. 593, 605; *Steele* v. *United States,* 267 U. S. 505; *Gila Valley Ry. Co.* v. *Hall,* 232 U. S. 94, 103; see *Nardone* v. *United States,* 308 U. S. 338, 341. His determination will not be reviewed here after it has been concurred in on appeal (see *Goldman* v. *United States,* 316 U. S. 129, 135), particularly when, as in this case, it is so clearly supported by the evidence.

(b) The evidence in question consisted, not of personal records of the present petitioners, but of the books, records, and papers of corporations which were not defendants in the criminal prosecution. This evidence could have been obtained through the use of legal process, independently of any proffer on petitioners' part, and could have been used against them regardless of their consent or objection. Internal Revenue Code, Sec. 3614 (26 U. S. C. 3614); cf. *Cooper* v. *United States,*

9 F. 2d 216 (C. C. A. 8). Consequently the discussion throughout the petition of principles governing individual confessions is wide of the mark. Moreover, the cases relied upon as establishing a conflict, in this Court[4] and in other circuits,[5] are not in any sense inconsistent with the decision below.

(c) Finally, the trial judge here did not foreclose the jury's consideration of the issue of voluntary disclosure. He explicitly enjoined the jury to consider all of the transactions touching the alleged disclosure for the purpose of determining whether in view thereof the petitioners had the requisite intent to commit the crimes charged. With particular reference to the filing of returns in 1945, practically contemporaneously

[4] *Lyons* v. *Oklahoma*, 322 U. S. 596, and *Lisenba* v. *California*, 314 U. S. 219, were appeals from state courts; there, under the local practice involved, juries were required to pass upon the admissibility of confessions already admitted by the trial judge. *Wilson* v. *United States*, 162 U. S. 613, as the court below noted (R. 2199), contains at the most a dictum that the question of the admissibility of a confession may (not must) be submitted to a jury.

[5] *Cohen* v. *United States*, 291 Fed. 368 (C. C. A. 7), simply holds that the trial judge must make a preliminary determination of the voluntariness of an individual confession before submitting it to the jury; there it was submitted without any such determination. *McAffee* v. *United States*, 105 F. 2d 21 (App. D. C.), and *Denny* v. *United States*, 151 F. 2d 828 (C. C. A. 4), discuss the instructions to be given a jury as to the probative value of an individual confession already admitted in evidence following the judge's preliminary determination.

with the alleged disclosure, the court charged (R. 1872):

> A man can't intend to defraud and at the same time have an honest intention to disclose past irregularities in connection with income taxes. At least I don't think so.

Further, the jury was not restricted in its weighing of the "disclosure" testimony to the offenses committed in 1945. They were given unusual latitude to go "so far back as you may care to to go or as far ahead as you may care to go, on these returns that they filed within or reasonably near that period" (R. 1873). Under the charge given, it would seem reasonable to assume that if the jury believed that petitioners entertained an honest intent to make voluntary disclosure of their past frauds, the jury would have acquitted at least on count fourteen (R. 35–37), charging tax evasion on February 15, 1945, and on counts five (R. 18–20) and twenty-two (R. 51–53), which charged tax evasion on March 15, 1945.

3. It seems appropriate to note that petitioners do not question here (Pet. 6), nor did they below (R. 2195), that there was a willful attempt on their part to evade the payment of taxes and a conspiracy to accomplish that result.

CONCLUSION

The decision below is obviously correct, there is no conflict of decisions, and the questions sought to be raised by the petition for a writ of certiorari

are never reached on the present record. The petition should therefore be denied.

Respectfully submitted.

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